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Revised version of the amendments to the Statute of the International Court of Justice submitted by Guatemala to the Special Committee in 1997 and slightly modified in 1998

Working paper submitted by Guatemala

Explanatory memorandum

1. The Government of Guatemala has pursued its consideration of how to amend the Statute of the International Court of Justice to extend the latter's competence with respect to contentious matters to disputes between States and intergovernmental organizations.

2. As a result, we have formulated a new version of the amendments submitted in 1997 and 1998,[1] which appears in the annex to the present memorandum. Below is a brief explanation of the essential features of the new proposal and the grounds on which it is based.

3. Article 36, paragraph 1, of the Statute of the International Court of Justice describes the conditions and procedures for recognizing the Court's jurisdiction in contentious matters by methods other than the declarations referred to in paragraphs 2, 3 and 4 of that Article. This description, which is complemented to a certain extent by Article 40, paragraph 1, of the Statute, is formulated in very general terms in those paragraphs. It has therefore been necessary for the Court to deal with these matters more specifically in its Rules.

4. Guatemala's original proposal departed from the above-mentioned provisions of the Statute in that it attempted to regulate, in some detail, the matter in question: namely, the procedures for recognizing the Court's competence in contentious matters with respect to disputes between intergovernmental organizations and States. In other words, the provisions of the Statute that should serve as guidelines are synthetic, whereas Guatemala's original proposal is more analytic.

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5. To eliminate this inconsistency, and because there is no inherent need to enter into so much detail, we have drawn up new provisions that are less specific and considerably more concise than those of the original proposal.

6. Accordingly, without prejudice to the retention of Article 36A, paragraph 1, subparagraph (a), of the original proposal, the current proposal no longer distinguishes between, on the one hand, disputes between an organization and its member States and, on the other, disputes between an organization and States which do not belong to it. This has made it possible to delete Article 36B of the original proposal.

7. It should be noted that paragraph 2 of the new Article 36A, which is one of the innovative elements of our new proposal, is both an adaptation and a counterpart of Article 36, paragraph 1, of the Statute, to which a minor amendment has been proposed to distinguish its scope of application clearly from that of Article 36A, paragraph 2 (see section B of the new proposal).

8. Article 36B, which is contained in section D of the new proposal and which does not correspond to any provision of the original proposal, is intended to fill what could be considered a gap in the original proposal. This gap reflects the fact that the original proposal did not take into account the desirability of ensuring that every intergovernmental organization to which the Court's jurisdiction is extended expressly accepts the obligations of a State party to the Statute. In the new arrangement being proposed, there is in fact an obvious parallel between the position of an intergovernmental organization and that of a State to which Article 35, paragraph 2, of the Statute applies. On the basis of these considerations, the new Article 36B provides that the organization must deposit a declaration modelled after those provided for in the resolution which the Security Council adopted to give effect to the above-mentioned provision of the Statute, namely, resolution 9 (1946) of 15 October 1946. (It should be noted, however, that the declarations envisaged in Article 36B serve a purpose which is very different from that of the declarations provided for in the above-mentioned Security Council resolution.)

9. Amendment E of the original proposal has been deleted because Article 40 of the Statute can apply both to cases brought in accordance with the existing Statute and to cases brought on the basis of the proposed additional provisions of the Statute.

10. Because the Statute should not regulate the functioning of the United Nations, the new proposal does not include a provision corresponding to Article 36A, paragraph 3, of the original proposal (section B of that proposal). In this connection, it should be specified that, in our view, the adoption of the new proposed amendments to the Statute of the Court would not require an amendment to the Charter of the United Nations itself because disputes between the United Nations and States, whether or not they are Members, can be referred to the Court.

11. A slight change of terminology has been made, consisting of the replacement of the term "international organization comprised of States", which was used in the original proposal, by the term "public international organization", which is used by the Statute of the Court to refer to such entities (see Article 34, paragraphs 2 and 3, of the Statute).

12. Because nearly every State in the world is a party to the Statute of the Court, it is highly unlikely that a significant number of the States members of an intergovernmental organization would not be parties. Therefore, and in view of the severely limited economic resources of the very few States that are not parties to the Statute of the Court, it does not seem appropriate to extend, by analogy, the application of Article 35, paragraph 3, of the Statute to intergovernmental organizations that are parties to disputes referred to the Court.[2]

13. The new proposal extends to intergovernmental organizations not only Article 62 of the Statute (as had section G of the original proposal), but also Article 63, paragraph 1, of the Statute (see section H).

14. Article 36C of the new proposal (section E) excludes the institution of an ad hoc judge with respect to disputes between States and intergovernmental organizations referred to the Court. However, we are not completely convinced that this exclusion, which also appears in the original proposal (section D), is justified. The views of other States in this regard would be welcome.

15. It has been suggested, as the *only* means of extending the Court's competence in this manner, that an appropriate amendment should be made to Article 35, paragraph 2, of the Statute. We would welcome the opinions of other States on this suggestion, which we view a priori with some scepticism.

16. Another modality which might be envisaged, but which we also view with scepticism, would be to allow intergovernmental organizations to become parties to the Statute, on the basis of an amendment to that effect to Article 93, paragraph 2, of the Charter, and the consequent revisions of the Statute which would be necessary. We wish to point out that if this modality were to be adopted, the United Nations might be a party to the Statute, which would be an anomaly. In any event, however, we would be interested in the views of other States concerning this modality.

17. It should be noted, moreover, that our new proposal does not use declarations similar to those provided for in Article 36, paragraph 2, of the Statute as a means of extending the competence of the Court to disputes between States and intergovernmental organizations. It does not appear to us to be either necessary or appropriate to avail ourselves of this remedy. We would nonetheless be interested in the opinion of those who might not share this view.[3]

18. Lastly, mention should be made of a problem raised by both our new proposal and the original one, which is as follows: Should the United Nations itself be a party to a proceeding before the Court, a literal interpretation of Article 94, paragraph 2, of the Charter would allow the Organization, if the Court ruled in its favour and the other party failed to comply with the decision, to have recourse to the Security Council in accordance with the said provision. As such a remedy would be absurd, it might perhaps be appropriate to amend the paragraph in question in order to ensure that a literal interpretation does not give rise to that remedy.

(Alternatively, if it is deemed inappropriate that an intergovernmental organization should be able to submit a complaint against a State to the Security Council, such a possibility could be eliminated through a slight amendment to the Charter. Such an amendment would consist of inserting in Article 94, paragraph 2, immediately following the initial word "If": ", where the parties are exclusively States, ...".)

Notes

[1] For the text of the amendments in question, see paragraphs 101 and 129, respectively, of the reports of the Special Committee to the General Assembly at its fifty-second (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 33* (A/53/33)) and fifty-third (ibid., *Fifty-third Session, Supplement No. 33* (A/53/33)) sessions.

[2] In the proposal submitted by Costa Rica to the Special Committee in 1997 the application of the paragraph is extended in this way. (For the text of the proposal in question, see paragraph 115 of the report of the Special Committee to the General Assembly at its fifty-second session (see note 1 above).

[3] The proposal submitted by Costa Rica to the Special Committee in 1997 (see note 2 above) includes unilateral declarations similar to the ones envisaged in Article 36, paragraph 2, of the Statute. They were also included in the original Guatemalan proposal, but in a way which we now think is flawed.

Annex

New proposal submitted by Guatemala for the amendment of the Statute of the International Court of Justice to extend its competence with respect to contentious matters to disputes between States and intergovernmental organizations

A. Article 34, paragraph 1, *should read*:

"1. Only States and, under the conditions laid down in Article 36A, the United Nations or any other public international organization established by a treaty registered in accordance with Article 102 of the Charter of the United Nations may be parties in cases before the Court."

B. *Insert* in Article 36, paragraph 1, immediately after "Court", the words "to deal with disputes between States".

C. *Insert* an Article 36A *reading*:

"Article 36A

"1. The Court shall be competent to deal with any dispute between a State or a number of States, on the one hand, and a public international organization, on the other, where the constituent instrument of the organization confers competence on the Court for such purpose and the dispute is one of those provided for in the relevant provisions of the instrument.

2. The competence of the Court shall extend to all disputes between a State or a number of States, on the one hand, and a public international organization, on the other, which are referred to it by the parties. It shall also encompass, with respect to such disputes, all matters specifically provided for in treaties to which one or a number of States and a public international organization are parties.

3. In the event of a dispute as to whether the Court has jurisdiction under this Article, the matter shall be settled by the decision of the Court."

D. *Insert* an Article 36B *reading*:

"Article 36B

"In order that competence may be conferred on the Court, under Article 36A, paragraph 1 or 2, with respect to a dispute to which a public international organization is a party, such organization shall have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the terms and subject to the conditions of the Statute and the Rules of the Court, to settle the dispute referred to it or to exercise its competence under the provisions of the relevant treaty or convention. In the declaration the organization shall also undertake to comply in good faith with the decision or decisions of the Court concerning the dispute referred to it or the matter with which it deals by virtue of the relevant treaty or convention, and to accept the obligations of a Member of the United Nations under Article 94 of the Charter of the United Nations."

E. *Insert* an Article 36C *reading*:

Article 36C

"In any of the cases provided for in Article 36A, neither Article 31, paragraphs 2, 3, 4 and 6, nor Article 34, paragraph 3, shall apply with respect to a public international organization which is a party to the dispute."

F. In Article 53, paragraph 2, Article 36A should be mentioned, as well as Articles 36 and 37.

G. *Insert* in Article 62, paragraph 1, immediately after the word "State": ", the United Nations or another public international organization to which the Court is open under Article 34, paragraph 1."

H. In Article 63, paragraph 1, *replace* the words "States other than those concerned in the case are parties" *by* "States other than those concerned in the case, the United Nations or other public international organizations to which the Court is open under Article 34, paragraph 1, are parties ...". At the end of the paragraph, *replace* the words "all such States" *by* "all such States and public international organizations (including the United Nations) to which the Court is open under Article 34, paragraph 1."